

**Child Custody after Divorce  
(Case Study of Court Decision Number 242/Pdt.G/2019/PN.Tjk)**

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**Abstract**

Marriage is the legally or formally recognized union of two people, a man and a woman, as partners who are physically and mentally bonded with the aim of forming a harmonious family or household. However, not all marriages last forever. When a marriage ends, divorce can occur. Divorce itself brings legal consequences, one of which is regarding child custody. Child custody after the occurrence of a divorce based on the provisions of Article 41 letter (a) of Law Number 1 of 1974 stipulates that both parents are obliged to continue to care for and educate their child for the benefit of the child and if there is a dispute regarding the control of the child, the court gives its decision. However, in reality a lot has happened in nurturing and educating child after the divorce, as in the case of Number 242/Pdt.G/2019/PN.Tjk.

**Keywords:** Child Custody, Divorce

## INTRODUCTION

Marriage is an act that legalizes coexistence between a man and a woman in a family. The purpose of a marriage for humans is not only to produce or have offspring, but more than that, it is to achieve inner and outer happiness and the most important thing is to carry out religious orders and also form a family. In general, a family is said to be complete when the couple finally has child. If the family has been blessed with child, then the family must pay attention to the needs of the child, both physically and mentally.<sup>1</sup>

In fact, not all marriages last and certainly no one wants a marriage to end tragically. Not a few couples who finally have to choose to separate or divorce. Incompatibility factors in several ways, differences in perceptions and views of life, at least become some of the causes of divorce. When every effort is made to save the marriage, but in the end the marriage is decided to end in divorce by the court, new problems arise. The termination of marriage based on a court decision that has permanent legal force (*inkracht van gewijsde*) has legal consequences after the divorce occurs.<sup>2</sup>

There are legal consequences, one of which is regarding the custody of child born from a marriage. From interactions with parents and child will result in the existence of a right and obligation. The rights and obligations of parents towards their child have been clearly regulated in Law no. 1 of 1974 and Law no. 23 of 2002 concerning Child Protection and Article 1 paragraph 11. Basically, child care is the responsibility of both parents; both in terms of education, economy, care, protection, and child development according to the religion and beliefs of their parents.<sup>3</sup>

For a marriage that ends due to divorce, there will be legal consequences related to child custody issues which have been regulated by Law no. 1 of 1974 concerning Marriage, in article 41:

“The consequences of dissolution a marriage due to divorce are:

- a) Both mother and father are still obliged to care for and educate their child, solely based on the interests of the child; if there is a dispute regarding the control of the child, the Court gives its decision.
- b) The father is responsible for all costs of maintenance and education needed by the child; if the father is found to be unable to fulfill this obligation, the Court may determine that the mother will bear the costs.
- c) The court may oblige the ex-husband to provide a living and/or stipulate obligations for the ex-wife”.

The article shows the affirmation that a man still has an obligation to protect his wife and provide for his wife (providing living expenses), even though the wife has been divorced and thus changed her status to ex-wife.

Based on the provisions of Article 39, it is explained that "a divorce can only be carried out before the court after the court has made efforts to reconcile and fail to reconcile between the parties". A divorce can be carried out with a suitable reason that the two (husband or wife) cannot live together anymore.

Divorce does not only affect the status of husband and wife or possession property but also more importantly in child care. In a divorce case, it is arguably the child who is most affected by the divorce. No child wants the parents to divorce. However, if divorce is a

<sup>1</sup> Joko Parmito, *Hukum Perkawinan Campuran Dalam Teori dan Praktek*, (Jakarta: Rineka Cipta, 2013), 7

<sup>2</sup> Sudarsono, *Hukum Perkawinan Nasional*, (Jakarta : Rineka Cipta, 2010), 3.

<sup>3</sup> *Ibid.*

choice taken by a married couple who already has child, then the child must be the main consideration, in order to minimize the negative impact of the divorce. The legal system in Indonesia places child in choices that are not necessarily the child's choice.<sup>4</sup>

Therefore, for parents, it is inevitable that both parties want their child to be close and in their care. This causes one party to feel more entitled to care for their child. This can happen because one feels more capable and better than the other, while the other also does not want to give up, in situations like this, the negotiation process to find a peaceful solution often reaches a dead end. This then led to a dispute in terms of child custody.<sup>5</sup>

Child custody is often a problem, before or after divorce. In fact, it is not uncommon for ex-husbands and ex-wives to fight each other to get custody of their children, as in the case of court decision Number 242/Pdt.G/2019/PN.Tjk. After the Plaintiff (Husband) and Defendant (Wife) separated and no longer lived together in the same house, the Plaintiff and Defendant never again lived a life like husband and wife.

The Defendant had started her new life and seemed to get too comfortable with her new status. The matters of nurturing, caring for, educating, sending the children to school and meeting the needs of the two children, namely; Child 1, aged 9 (nine) years and Child 2, aged 8 (eight) years are the full responsibility of the Plaintiff, while the third child, aged 3 (three) years is in the control of the Defendant. The problem then arose because the Plaintiff noticed that the Defendant did not take care of the Plaintiff's third child properly, this could be seen from the Defendant's actions that defendant continued to leave the Plaintiff's third child in the daycare center every single day.

In addition, the Defendant's rude attitude resulted in the children being reluctant and traumatized if they had to be with the Defendant. This happened because so far the Plaintiff's and Defendant's children have been very well cared for and educated by the Plaintiffs, so that these children have a closer emotional relationship with the Plaintiffs. The Defendant's rude attitude and the absence of a strong emotional relationship between the child and the Defendant were because the Defendant was very busy with her work and her own life. This was proven since the Defendant left their house, at which time the children chose to stay with the Plaintiff. The Defendant brought the Plaintiff's third child, but in terms of raising the Plaintiff's third child it was not done properly like a mother. The Defendant always left the Plaintiff's third child in a daycare center. For this reason, the plaintiff requests to obtain custody of Child 1, aged 9 (nine) years and Child 2, aged 8 (eight) years and Child 3, aged 3 (three) years.

However, in this case the custody of the 3rd child remains in the control of the wife, the panel of judges considers that:

1. The Defendant's actions in the form of violent acts may be in the form of giving lessons to their children with the aim of educating children who are still within the normal limits; Considering, whereas based on the testimony of the Witness, the third child had been brought by the Defendant to the home of the Defendant's parents and the Plaintiff had met the third child at the daycare center;
2. Based on the testimony of the Witness, the Defendant left her three children in the daycare because the Defendant was at work;
3. According to the Panel of Judges, leaving a child in a daycare is not automatically a bad thing or can damage the bond between the children and their parents or show that someone is unable to care for and educate his/her child;

<sup>4</sup> Surini Ahlan Sjarif dan Wahyono Darmabrata. *Hukum Perkawinan dan Keluarga di Indonesia*. (Jakarta: Rizkita, 2015). 28

<sup>5</sup> Wahyono Darmabrata. *Hukum Perkawinan Perdata*. Jilid I. (Jakarta: Rizkita, 2009).

4. According to the Panel of Judges, the Defendant left the child in a daycare center with the aim of providing for the child, not to do negative things;
5. According to the Panel of Judges, the three children are still under the age of 12 (twelve years), a time where they still really need the love of a mother. So if the three children are separated from their mother, it is feared that it will cause psychological disturbances.

Based on the foregoing, the purpose of this research is to describe the legal rules in determining child custody after a divorce as well as in the analysis of the case decision Number 242/Pdt.G/2019/PN.Tjk regarding the refusal of child custody is in accordance with the marriage law.

## RESEARCH METHOD

The research method used in this research is a normative juridical research based on written legal norms using secondary data, which consists of primary legal materials and secondary legal materials. Primary legal materials which are binding legal materials are legal rules regarding marriage and court decisions. Meanwhile, secondary legal materials are legal materials in the form of library legal materials such as books, journals, which are related to this research. The data was obtained by conducting a document study conducted through the library or online, which was then analyzed qualitatively.

## RESULTS AND DISCUSSION

### The rule of law in determining child custody after a divorce

According to Amir Nuruddin, "Childcare is the obligation of parents to maintain and educate their child as well as possible. This maintenance includes economic problems, education and everything that is the basic needs of the child. In terms of child's needs, especially for child who is still small and not yet independent."<sup>6</sup>

Responsibilities and duties in nurturing and educating child are basically the responsibility of parents; mom and dad. Parenting also refers to the responsibility of parents to monitor, provide and fulfill services that suit the child's needs.

Child care is basically the responsibility of both parents, which includes issues of education, economics, the love of both parents and everything that becomes the basic needs of a child. Therefore, the most important thing between husband and wife in raising child/children is cooperation, feelings and acts of mutual support and mutual help between husband and wife until the child grows into an adult. However, the fact is that the Marriage Law until now has not specifically regulated the control of child, even in Government Regulation (PP) Number 9 of 1975 in a broad and detailed manner. In general, the Marriage Law has actually provided rules for the maintenance of child in a marriage that must end due to divorce.

In article 41 it is stated:

"If the marriage ends due to divorce, then the consequences are:

1. Both the mother and father are still obliged to care for and educate their child, solely based on the interests of the child, if there is a dispute regarding the care of the child, the Court will give its decision.
2. The father is responsible for all costs of maintenance and education needed by the child, if the father is in fact unable to fulfill these obligations, the Court may determine that the mother is also responsible for the costs.
3. The court may oblige the ex-husband to provide living expenses and/or determine the ex-wife's share of obligations".

<sup>6</sup> Amir Nuruddin, *Hukum Perdata Islam di Indonesia*, (Jakarta : Kencana, 2004), 293

Regarding parents who have obligations to their child, it is contained in Chapter X starting from articles 45-49. Article 45 states:

(1) "Both parents are obliged to maintain and educate their child as best they can"

(2) The obligations of parents as referred to in paragraph (1) of this article are valid until the child marries or can stand alone, which obligations continue even though the marriage between the parents has ended".

Article 46 explains:

(1) "Child is obliged to respect his or her parents and obey their good will.

(2) If the child is an adult, he or she is obliged to take care according to his or her ability, his or her parents and family in a direct line upwards, if they need help.

Article 47 :

(1) "Child who has not reached the age of 18 (eighteen) years or has never been married, unless the child so wishes

(2) The parent represents the child regarding all legal actions inside and outside the Court".

Article 48

"Parents are not allowed to transfer rights or pawn permanent assets owned by their child who is not yet 18 (eighteen) years old or has never been married, unless the child so wishes."

Article 49

(1) "One or both parents may be revoked of power over one or more children for a certain period of time at the request of the other parent, the child's family in a direct line upwards and adult siblings or an authorized official by a court decision in things:

1. He or she is very neglectful towards his or her child.
2. He or she behaves very badly.

(2) Even though parents are deprived of their powers, they are still obliged to pay for the maintenance of the child.

"In the protection of the Convention on the Rights of the Child, it is also stated that both parents are responsible for ensuring the protection of the child and the development of growth for their child. This is stated in article 27 paragraph 2 which states that: "Parents or those who are responsible for the child, bear the primary responsibility to ensure within the limits of their ability and finances, the living conditions necessary for the development of the child."

So that child care becomes the legal basis that must be carried out for parents to nurture, care for and educate their child, as has been stated in article 26 of the Child Protection Act that:

(1) "Parents are obliged and responsible for:

- a. Raising, nurturing, educating, and protecting child;
- b. Caring for child according to their abilities, talents and interests; and
- c. Preventing child marriages.
- d. Providing character education and inculcating character values in child.

(2) In the event that the parents are absent, or their whereabouts are unknown, or for some reason, cannot carry out their obligations and responsibilities, as referred to in

paragraph (1), this matter may be transferred to the family, which is carried out in accordance with the provisions of applicable laws and regulations”.

Then, if both parents are divorced, the care and maintenance of the child remains an obligation and responsibility for the parents, even though one of the parents has custody of the child. However, child care and maintenance is the right of a child, which is prioritized for the benefit of the child in the future. This is stated in Article 14 of Law Number 23 of 2002 jo. 35 of 2014 concerning child protection which states:

(1) “Every child has the right to be cared for by his own parents, unless there are valid reasons and/or legal rules indicating that the separation is in the best interests of the child and is a final consideration.

(2) In the event of a separation as referred to in paragraph (1), the child still has the right to:

- a. Meet face-to-face and have regular personal contact with both parents.
- b. Get nurturing, care, protection and education for the process of growth and development from both parents; and
- c. Obtaining other child's rights”;

From the article above, this is in line with the Convention on the Rights of the Child (CRC) as described in article 9 which states that a child has a basic right to live with his or her parents, unless it is deemed not in accordance with his or her rights or interests. A child has the right to maintain a relationship with his or her parents if he is forced to separate from one or both of them. The state is obliged in the case of separation because it occurs as a result of state actions. However, in this case the State is also authorized to separate child from their parents in accordance with court decisions. Therefore, from the legal provisions regarding child protection and principles for the best interests of the child, the child must be the main consideration, as referred to in Article 3 Paragraph 1 of the Convention on the Rights of the Child, stated that:

"In all actions concerning children, whether carried out by the government or the private sector, courts, government authorities or legislative bodies, the best interests of the children must be the main consideration."

Thus, the regulation of child custody must be based on a consideration that is most important in the best interests of the child himself, so that the judge in making a decision for parents to obtain custody of their child by considering the interests of the child from all fields is intended for the benefit of the child himself without having to eliminate the child's relationship with his or her own parents.

### **Analysis of the case of the court decision Number 242/Pdt.G/2019/PN.Tjk regarding the refusal of child custody is in accordance with the marriage law.**

In the case Number 242/Pdt.G/2019/PN.Tjk where the plaintiff (husband) and the defendant (wife) were legally married on June 20, 2009 before a Christian religious leader named Reverend Pahala Simanjuntak, as the marriage was recorded in the Marriage Deed Number: 1871CPK1611201000981, issued by the Bandar Lampung City Civil Registry Office dated December 10, 2010, in which the original document regarding the Marriage Certificate is in the possession of the Wife;

That from the marriage between husband and wife, they have been blessed with 3 (three) children, namely:

- a. Child 1, 9 (nine) years old, born on May 1, 2010, whose birth certificate is taken and is in the possession of the husband;
- b. Child 2, 8 (eight) years old, born on November 5, 2011, whose birth certificate is taken and is in the possession of the husband;
- c. Child 3, aged 3 (three) years, born on October 29, 2016, whose birth certificate is taken and is in the possession of the husband;

After the Plaintiff and Defendant separated and no longer lived together in the same house, the Plaintiff and Defendant never again lived a life like husband and wife. The Defendant is busy with her own new life, where the affairs of nurturing, caring for, educating, sending to school and meeting the needs of the two children, namely Child 1, aged 9 (nine) years and Child 2, aged 8 (eight) years are the full responsibility borne by the defendant. While the affairs of nurturing, caring for the third child, aged 3 (three) years is in the control of the Defendant, the Plaintiff noticed that the Defendant did not properly care for the Plaintiff's third child as the defendant continued to leave the Plaintiff's third child in a daycare center every day.

However, in this case, the custody of the 3rd child remains with the wife's possession because the panel of judges considered that the Defendant's actions in the form of abusive actions could have been in the form of giving lessons to their children with the aim of educating children who are still within normal limits; Considering whereas based on the testimony of the Witness, the third child had been brought by the Defendant to the home of the Defendant's parents and the Plaintiff had met the third child at the daycare center;

Based on the testimony of the Witness, the Defendant left the 3 children in daycare center because the Defendant was at work. According to the Panel of Judges, leaving a child in a daycare is not automatically a bad thing or can damage the bond between the child and his or her parents or show that someone is not capable of caring for and educating his or her child. According to the Panel of Judges, the Defendant left the child in a child care center solely with the aim of providing for the child not to do negative things.

According to the Panel of Judges, the three children are still under the age of 12 (twelve years), where they still really need the love of a mother. so if the three children are separated from their mother, it is feared that it will cause psychological disturbances.

Berdasarkan Pasal 49 ayat (1) huruf a dan b Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan dikatakan bahwa: "Salah seorang atau kedua orang tua dapat dicabut kekuasaannya terhadap seorang anak atau lebih untuk waktu yang tertentu atas permintaan orang tua yang lain, keluarga anak dalam garis lurus ke atas dan saudara kandung yang telah dewasa atau pejabat yang berwenang dengan keputusan Pengadilan dalam hal-hal : a. Ia sangat melalaikan kewajibannya terhadap anaknya; b. Ia berkelakuan buruk sekali";

#### Article 49

Based on Article 49 paragraph (1) letters a and b of Law Number 1 of 1974 concerning Marriage it is stated that: "One or both parents may be revoked of power over one or more children for a certain period of time at the request of the other parent, the child's family in a direct line upwards and adult siblings or an authorized official by a court decision in things: a. He or she is very neglectful towards his or her child; b. He or she behaves very badly.

According to the panel of judges, because the evidence submitted by the Plaintiff above cannot prove that the Defendant has neglected her obligations to her child or the Defendant has behaved very badly, such as being very rude, drunk, extravagant, gambler,

drug user, then the plaintiff's claim has no legal basis to be granted. The claim must be rejected.

With the rejection of the Plaintiff's claim, the Defendant still has custody of the children and continues to have responsibilities to the three children as before, as stated in Article 41 letter (a) of Law Number 1 of 1974 concerning Marriage stating: "Both mother or father still obliged to care for and educate their child, solely based on the interests of the child; when there is a dispute regarding the control of children, the court gives its decision.

However, considering Article 14 of Law Number 23 of 2002 concerning Child Protection where it is stated that: "every child has the right to be cared for by his or her own parents, unless there are valid reasons and/or legal rules indicating that the separation is in the best interests of the child and this is the final consideration."

According to the author, the panel of judges should be able to grant the request from the husband who applied for custody of his third child, because it is in the best interests of the child, because by being directly cared for by parents, a child will have better affection than having to be placed in daycare center.

According to the author, based on Law Number 1 of 1974 concerning marriage which also regulates provisions related to child custody, this is stated in article 41 letter (a) which states that "both mothers and fathers are still obliged to maintain and educate children, solely based on the interests of the child; It is clear that this article also mentions the interests of child, and the interests of child are the most important factor overcoming other factors.

## CONCLUSION

The legal rules regarding child custody in Law No.1 of 1974 concerning Marriage are not regulated in detail because the Marriage Law only regulates the legal consequences of divorce, which are contained in the provisions of Article 41. The panel of judges in determining child custody must consider the best interest principle for child, which must be the main consideration, as referred to in Article 3 Paragraph 1 of the KHA (Convention on the Rights of the Child).

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